Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments	WC Docket No. 07-245 RM-11293 RM-11303

COMMENTS OF VERIZON IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

Karen Zacharia
Rashann R. Duvall

VERIZON
1515 North Courthouse Road, Suite 500
Arlington, VA 22201-2909
(703) 351-3179

Michael E. Glover
Of Counsel

Helgi C. Walker
Brendan T. Carr
WILEY REIN LLP
1776 K Street, NW
Washington, D.C. 20006
(202) 719-7000

Attorneys for Verizon

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I. INTRODUCTION AND SUMMARY

Prompt Commission action is needed to establish competitive and regulatory parity with respect to the rates that various providers of broadband services are charged for pole attachments used to provide broadband services. The existing regulatory regime governing pole attachment rates results in directly competing broadband providers being charged widely varying rates depending on whether they began life as a incumbent local exchange carrier (ILEC), competitive local exchange carrier (CLEC), or cable television provider. The widely varying rates stem from the fact that, while the current regulatory regime establishes two different rate formulas for pole attachments by non-incumbent telecommunications carriers and cable television systems, the Commission has not yet adopted a formula for the rates charged to telecommunications carriers that qualify as incumbents under the definition in the Pole Attachment Act. As a result of this disparate regulatory treatment, ILECs are often forced to pay pole attachment rates that are at least two to three times higher than the rates that other carriers and cable television systems pay

[1] The Verizon companies ("Verizon") participating in this filing are the regulated, wholly-owned affiliates of Verizon Communications Inc.

for the same attachments. This system is neither rational nor sustainable in today's environment, where these various providers compete head-to-head to provide broadband services, and either have expanded or are expanding into one another's core businesses (cable into telephony and vice versa).

To fix this broken system, the Commission should promptly exercise its express statutory authority over the rates, terms, and conditions of all pole attachments to establish a uniform rate formula for pole attachments by all providers of telecommunications services and cable television systems that offer broadband services. That same uniform rate formula should also apply to *all* attachments by ILECs, and ensure that pole owners are compensated for the costs of providing pole space for those attachments. Adopting this uniform formula will establish parity between cable companies and telephone companies when each provides facilities-based broadband services, and encourage the deployment of advanced communications services, including broadband services.

Further, the Commission should confirm that ILECs can file complaints to seek relief from unreasonable pole attachment rates, terms, and conditions. The current rules in this respect are ambiguous, and there is no justification for denying ILECs the same remedy that is available to competitors.

The Commission should not, however, adopt additional regulation concerning the terms and conditions of access to poles and conduit. The existing guidelines already ensure reasonable, non-discriminatory, and safe access to poles and conduit. Moreover, the Commission has previously rejected the type of specific rules Fibertech Networks LLC ("Fibertech") and others have proposed because "there are simply too many variables to permit any other approach with

respect to access to the millions of utility poles and untold miles of conduit in the nation."[2] Nothing has changed that would warrant taking a different approach.

II. DISCUSSION

A. The Commission Should Exercise its Express Statutory Authority to Adopt a Uniform Rate Formula for Broadband Attachments By All Providers.

1. A Prompt Regulatory Solution Is Needed to Fix the Uneven Playing Field That Exists Under the Current Regulatory Regime for Pole Attachment Rates.

In its Notice of Proposed Rulemaking, the Commission tentatively and correctly concluded that "due to the importance of promoting broadband deployment and the importance of technological neutrality . . . .all categories of providers should pay the same pole attachment rate for all attachments used for broadband Internet access service."[3] As explained below, this uniform rate formula should apply to all attachments by providers of telecommunications services or cable service who also offer broadband service. To further level the playing field for like providers of similar services, that uniform rate formula should also apply to *all* attachments by ILECs.

The current regulatory regime governing pole attachment rates is broken. Although CLECs, cable television systems, and ILECs compete directly against when they offer broadband

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[2] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 1143 (1996) ("*Local Competition Order*").

[3] Notice of Proposed Rulemaking, *Implementation of Section 224 of the Act; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 22 FCC Rcd 20195, ¶ 36 (2007) ("*NPRM*"). For the purposes of these comments, the terms "broadband attachment" or "attachment of a broadband provider" includes any attachment used by either a provider of telecommunications service or cable television system that is technically capable of providing high speed Internet access services (*i.e.* Internet access with transmission speeds of more than 200 kpbs in each direction). This would include, but is not limited to, commingled attachments that are capable of providing broadband services as well as other services including, but not limited to, telephony, video, and cable services.

services—and increasingly offer triple-play packages that bundle television, telephone, and Internet services under a single rate plan—they pay widely varying rates for pole attachments used to provide these services. These widely varying pole attachment rates stem from the fact that the existing regime sets two different maximum rate formulas for attachments by cable television systems and non-incumbent telecommunications carriers, but does not establish any formula for the rates charged to incumbent carriers for attachments. Specifically, Sections 224(d) and (e) require the Commission to establish formulas for determining the maximum just and reasonable rates that non-incumbent telecommunications carriers and cable television systems can be required to pay for pole attachments. To implement these sections of the statute, the Commission adopted the telecommunications carrier rate formula (outlined in Commission rule 1.1409 (e)(2)) and the cable television system rate formula (outlined in Commission rule 1.1409(e)(1)). Of the two formulas, the cable rate formula produces lower rates than the telecommunications rate formula.[4] However, because there is no default rate formula for attachments by ILECs, rates for pole attachments by ILECs are set through commercial agreements. These "negotiated" rates are generally significantly higher than the rates that non-incumbent carriers and cable television systems pay.

Although the Commission's rules make clear that the two maximum rate formulas are to be used in the event of a dispute, they serve as *de facto* ceilings on the rates that cable television systems and non-incumbent telecommunications carriers can be charged.[5] Currently, because

[4] The cable rate is based on the amount of usable space on a pole. By contrast, the rate formula for non-incumbent telecommunications carriers is also accounts for the amount of unusable space on a pole. Due to clearance requirements, there is more unusable space on a pole than usable space. As a result, the cable formula yields lower rates than the telecommunications formula.

[5] 47 C.F.R. § 1.1409(e) ("When the parties fail to resolve a dispute regarding charges for pole attachments and the Commission's complaint procedures under Section 1.1404 are invoked, the

ILECs have no default formula, no *de facto* ceiling applies to determine "just and reasonable" rates for ILEC pole attachments. In the absence of a rate formula, utilities that solely own poles generally charge ILECs at least two to three times more for pole attachments than they charge CLECs and cable television systems. In some cases, the higher rates ILECs are forced to pay can result in electric utilities recovering more than one hundred percent of the costs they incur to own and carry their solely-owned jointly-occupied distribution poles. Additionally, due to these higher rates, ILECs frequently pay a higher percentage of the electric company's costs to own and carry attachments even though attachments by electric utilities generally require more than triple the space that ILEC attachments require.

The current state of affairs places ILECs at a significant disadvantage where they directly compete with cable television systems and CLECs to provide similar facilities-based services. The higher pole attachment rates ILECs are forced to pay significantly increase the costs that ILECs incur to deploy and deliver advanced communications services—costs that necessarily factor into the rates consumers pay for broadband services and influence decisions about investing in advanced communications services networks. Thus, the existing regulatory structure hinders competition among like providers of similar broadband services and discourages investment in networks for advanced telecommunications services.

This broken system needs to be repaired by establishing a common rate formula that applies to all attachments by providers of broadband services. As explained below Section 224(b)(1) authorizes the adoption of a single rate formula for all providers of broadband services, including non-incumbent telecommunications carriers, cable television systems and ILECs.

Commission will apply the following [cable rate or telecommunications carrier rate] formulas for determining a maximum just and reasonable rate . . . .").

A single uniform rate formula for all providers of broadband services (which should also apply to all ILEC attachments) would bring about parity for broadband service providers with respect to pole attachment rates. To best promote the expansion of advanced communications services, including, but not limited to, broadband Internet access services, the Commission should adopt a uniform rate formula that will produce the lowest possible rate that would bring about competitive parity between ILECs, CLECs, and cable television systems, and also ensure that pole owners are compensated for the costs of providing pole space for attachments by providers of broadband service. Establishing this type of rate formula would also significantly reduce the costs ILECs (and, depending on where the formula is set, the costs of other attachers) pay for attachments, therefore freeing up funds that could be used to further invest in advanced communications networks. A uniform formula for the rates all broadband providers pay for broadband attachments would also mirror the existing regulatory regime for conduit attachment rates, which makes a single rate applicable to conduit attachments by cable operators *and* telecommunications carriers.[6]

2. The Commission Has Statutory Authority to Adopt a Uniform Rate Formula for Broadband Attachments by all Providers of Broadband Services.

The Commission has express statutory authority to establish a uniform formula for rates charged to all broadband providers. The history, express terms, and precedent interpreting the Act all confirm that the Commission has this authority. Congress originally enacted the Pole Attachment Act in 1978, at a time when the cable industry was still developing.[7] As a result, the

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[6] *See* 47 C.F.R. § 1.1409(e)(3) ("The following formula shall apply to attachments to conduit by cable operators *and* telecommunications carriers" (emphasis added)).

[7] *See* Communications Act Amendment of 1978, Pub. L. No. 95-234, 92 Stat. 33 (codified as amended at 47 U.S.C. § 224) ("Pole Attachment Act"). "As originally enacted, Section 224 was designed to ensure that utilities' control over poles and rights-of-way did not create a bottleneck that would stifle the growth of cable television." Report and Order, *Implementation of Section*

legislation focused on protecting the then-emerging cable companies from discrimination by pole owners with respect to the rates, terms, and conditions for pole attachments that they needed in order to deliver cable television service.[8] In particular, Congress provided that "the Commission *shall* regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions."[9] Accordingly, the Pole Attachment Act, as originally passed, did not provide cable television systems with a mandatory right of *access* to poles, but instead prohibited discrimination against cable operators once a utility provided a cable television system with access (and created a

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703(e) of the Telecommunications Act of 1996, 13 FCC Rcd 6777, ¶ 3 (1998) (subsequent history omitted) ("*1998 Implementation Order*"); *see also* H.R. REP. NO. 104-204(I), at 91 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 58 ("The beneficial rate to cable companies was established to spur the growth of the cable industry, which in 1978 was in its infancy.").

[8] *See, e.g.*, S. REP. No. 95-580, at 14 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 122 ("The Committee believes that federal involvement in pole attachment arrangements should serve two specific, interrelated purposes: To establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public."); *see also* Consolidated Partial Order on Reconsideration, *Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, ¶ 7 (2001) ("*2001 Partial Order on Reconsideration*"); ("Congress sought to constrain the ability of utilities to extract monopoly profits from cable television system operators in need of pole, duct, conduit or right-of-way space for pole attachments."); *FCC v. Florida Power Corp.*, 480 U.S. 245, 247-48 (1987) (observing that Congress passed the Pole Attachment Act "[i]n response to arguments by cable operators that utility companies were exploiting their monopoly position by engaging in widespread overcharging"). Prior to Congress's decision to enact the Pole Attachment Act, the FCC investigated allegations of overcharging by utilities, but the Commission concluded that it had no jurisdiction to address the problem because pole attachments were not "communication by wire or radio" under the Communications Act. *See California Water & Telephone Co.*, 64 F.C.C.2d 753 ¶ 14 (1977).

[9] *See* 47 U.S.C. § 224(b)(1) (emphasis added). The 1978 enactment defined the term "pole attachment" as "any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility." *See* Pub. L. No. 95-234, 92 Stat. 33 (1978). Though Congress amended the definition of "pole attachment" in 1996, *see* 47 U.S.C. § 224(a)(4), Section 224(b)(1) contains the same language today as it did in 1978.

complaint system to enforce the non-discrimination mandate).[10] This statutory framework remained in place for 18 years. During that time period, cable companies entered the market, obtained the access they needed to utility and telephone poles all across the country, and became the dominant providers of video services.

In passing the Telecommunications Act of 1996,[11] and in light of its decision to promote greater intermodal and intramodal competition in various telecommunications markets, Congress revisited the federal regulatory structure governing pole attachments. [12] Congress made two separate categories of amendments to the original Pole Attachment Act that are relevant for present purposes. First, Congress added Section 224(f) to the Act and thereby codified a mandatory right of non-discriminatory access for certain providers.[13] In addition to cable television systems (entities that had already obtained access to poles, but were expected to begin providing telephone services in direct competition with incumbent telephone companies), Congress extended this right of access to other new carriers entering the market that would still

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[10] *See, e.g., 2001 Partial Order on Reconsideration* ¶ 13 ("[T]he original purpose of the Pole Attachment Act, [was] to prevent utilities from charging monopoly rents to attach to their bottleneck facilities."); *see also* S. REP. No. 95-580, at 16 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 124 ("It has been made clear in testimony by CATV industry representatives to this Committee that access to utility poles does not in itself constitute a problem, among other reasons because CATV offers an income-producing use of an otherwise unproductive and often surplus portion of plant.").

[11] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act").

[12] *See* 1996 Act § 703; *see also Southern Co. v. FCC*, 293 F.3d 1338, 1341-42 (11th Cir. 2002) (observing that Congress amended Section 224 in 1996 based (in part) on an understanding that increased intramodal and intermodal competition for telecommunications services meant that Congress needed to expand the reach of the Pole Attachment Act).

[13] *See* 1996 Act § 703(7) (adding subsection 224(f) to 47 U.S.C. § 224). Section 224(f) provides that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). As noted above, this right was not included in the original 1978 enactment.

be in the early stages of obtaining access to poles.[14] Because incumbents generally already had access to poles (whether their own or another's poles), this provision was not extended to incumbents.[15] Accordingly, when the right of access was codified in Section 224(f), it was expressly applied to cable television systems and to "telecommunications carriers," with a unique definition of the latter term for purposes of the access provision that excluded ILECs but includes all other providers of telecommunications service.[16]

The second relevant change Congress made to Section 224 in 1996 was to address the issue of rates.[17] In this respect, Congress made two inter-related amendments to the pole attachment scheme. First, Congress modified the definitions contained in the original enactment to broaden the category of pole attachments to which the statute applies. Whereas the original Pole Attachment Act applied only to attachments by a cable television system, the 1996 Act enlarged the scope of pole attachments that are covered by the statute's non-discrimination mandate to include pole attachments by any "provider of telecommunications service."[18]

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[14] 47 U.S.C. § 224(f)(1). *See also Southern Co.*, 293 F.3d at 1342, n.1 ("A number of new telecommunications entities had been seeking to attach their wires to utility poles for some time, but were not covered by the Pole Attachments Act. The 1996 Telecommunications Act added telecommunications carriers to the class of entities entitled to regulated rates for pole attachments, and granted them the same access rights given cable companies.").

[15] *See* 1996 Act § 703; *see also 1998 Implementation Order* ¶ 49 ("ILECs generally possess that access").

[16] *See* 47 U.S.C. § 224(f)(1) (extending the right of access to a "cable television system or any telecommunications carrier"); *see also id.* § 224(a)(5) ("For purposes of this section [224], the term 'telecommunications carrier' [as defined in section 153 of this title] does not include any incumbent local exchange carrier as defined in section 251(h) of this title.").

[17] *See* 1996 Act §§ 703(6)-(7) (adding new subsections 224(d)(3) and 224(e) to 47 U.S.C. § 224); *see also* 47 U.S.C. §§ 224(d) and (e).

[18] *See* Telecommunications Act of 1996, § 703(2), 100 Stat. 150 (amending 47 U.S.C. § 224(a)(4) "by inserting after 'system' the following: 'or provider of telecommunications service'"); *see also* 47 U.S.C. § 224(a)(4). "In the original Act a 'pole attachment' was defined as 'any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility.' The Telecommunications Act of 1996 expanded the definition to

Significantly, and unlike Section 224(f)'s mandatory access provision—which applies to a "telecommunications carrier," as that term was newly defined for purposes of pole attachment access only—the definition in Section 224(a)(4) of "pole attachments" that are subject to the Act's rate provisions expressly uses a different and broader term—"provider of telecommunications service."[19] The use of the term "provider of telecommunications service" is both significant and intentional, given that Congress was making the two sets of changes simultaneously and chose to use two different terms.[20] The effect of this amendment was to subject pole attachments by all providers of telecommunications service (including ILECs) to the Commission's Section 224(b)(1) authority over rates, terms, and conditions[21]—even though Section 224(f)'s mandatory access right only applies to new entrant telecommunications carriers (other than ILECs) and to cable television systems.

Second, Congress in the 1996 amendments also set out rate formulas that apply in two particular circumstances. In particular, Congress preserved the original rate formula from the 1978 Pole Attachment Act that applied to cable television systems, but added a provision to

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include, as an additional regulated category, 'any attachment by a . . . provider of telecommunications service.'" *Nat'l Cable & Telecom. Assoc. Inc., v. Gulf Power Company*, 534 U.S. 327, 331 (2002) (internal citations omitted).

[19] *See* 47 U.S.C. § 224(a)(4).

[20] Congress' decision to use the term "telecommunications carrier" in some parts of Section 224 but "provider of telecommunications service" in another must be given full force and effect. *See, e.g., Clay v. United States*, 537 U.S. 522, 528-29 (2003) ("When 'Congress includes particular language in one section of a statute but omits it in another section of the same Act,' we have recognized, 'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *accord United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

[21] Under 1996 Act's definition of the term "telecommunications service," both ILECs and CLECs are providers of telecommunications service because they offer "telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). Accordingly, both ILECs and

make clear that the Commission was only required to apply this rate to pole attachments used by a cable television system "solely to provide cable service."[22] In addition, Congress adopted a different rate formula to cover certain attachments by the new entrant telecommunications carriers.[23] Beyond those two specific rate formulas, however, Congress did not try to anticipate and adopt a formula for other services or combinations of services that providers might offer going forward. For example, Congress did not adopt a rate formula for attachments used to provide a combination of cable television service and broadband service, or a combination telecommunications service and broadband offering, or a combination of all three.[24] Instead, Congress left the Commission with its general Section 224(b)(1) authority to establish "just and reasonable" rates in these circumstances.

Indeed, the Commission's general authority under Section 224(b)(1) to ensure reasonable rates for pole attachments by covered entities was expressly recognized by the Supreme Court in *Gulf Power*. In that case, the Supreme Court confirmed that the COMMISSION retains authority

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CLECs are providers of telecommunications service within the meaning of Section 224(a)(4) and their pole attachments are thus covered by Section 224(b)(1).

[22] *See* 1996 Act § 703(6) (amending 47 U.S.C. § 224(d) "by inserting after subsection (d)(2) the following: "'(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service'"); *see also* 47 U.S.C. § 224(d).

[23] *See* 1996 Act § 703(7) (amending 47 U.S.C. § 224 "by adding at the end thereof the following: '(e)(1) The Commission shall, no later than 2 years after the date of enactment of the Telecommunications Act of 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments'"); *see also* 47 U.S.C. § 224(e) (2) and (3) (setting out the elements of the formula for attachments by telecommunications carriers). The non-incumbent telecommunications carrier formula is as follows: Maximum Rate= Space Factor X Net Cost of Bare Pole X Carrying Charge Rate, Where Space Factor = [(Space Occupied) + (2/3 X unusable space/ no. of attaching entities)]/ pole height.

[24] *See* 47 U.S.C. § 224.

to determine the rate formula to apply when cable television systems provide broadband service in addition to their traditional cable services.[25] The Court examined the question whether the Commission has the authority to regulate "just and reasonable" rates for pole attachments used to provide commingled cable television service and high speed Internet access service. The Court first concluded that the commingled cable attachments at issue fell within Section 224(a)(4)'s definition of the term "pole attachment" because they were attachments "by" a cable television system. In reaching this conclusion, the Supreme Court explained that "[t]he addition of a service does not change the character of the attaching entity-the entity the attachment is 'by.' And this is what matters under the statute."[26]

The Supreme Court further concluded in *Gulf Power* that Section 224(b)(1) grants the Commission authority to regulate rates for commingled cable attachments, even though Section 224 did not require the Commission to use a specific rate formula for those attachments. [27] In reaching that conclusion, the Supreme Court explained:

> Congress did indeed prescribe two formulas for "just and reasonable" rates in two specific categories; but nothing about the text of §§ 224(d) and (e), and nothing about the structure of the Act, suggest that these are the exclusive rates allowed. It is true that specific statutory language should control more general language when there is a conflict between the two. Here, however, there is no conflict. The specific controls but only within its self-described scope.
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> The sum of the transactions addressed by the rate formulas—§ 224(d)(3) (attachments "used by telecommunications carriers to provide telecommunications services") and § 224(e)(1) (attachments "used by

[25] *See Gulf Power*, 534 U.S. at 327.

[26] *Id.* at 333.

[27] The Commission was under no obligation to apply the Section 224(d)(3) cable rate to commingled cable attachments because Section 224 only requires the Commission to apply the Section 224(d)(3) cable rate to "any pole attachment used by a cable television system *solely* to provide cable service." 47 U.S.C. § 224(d)(3) (emphasis added).

> telecommunications carriers to provide telecommunications services")—is less than the theoretical coverage of the Act as a whole. Section 224(a)(4) reaches "any attachment by a cable television system or provider or telecommunications service." The first two subsections are simply subsets of—but not limitations upon—the third.[28]

Consequently, the fact that Section 224 does not specify the applicable rate for attachments used by broadband providers does not preclude the Commission from adopting "just and reasonable rates" for those attachments under Section 224(b)(1). To the contrary, as the Supreme Court explained, "as a general rule, agencies have authority to fill gaps where the statutes are silent. It might have been thought prudent to provide set formulas for telecommunications service and 'solely cable service,' and to leave unmodified the FCC's customary discretion in calculating a 'just and reasonable' rate for commingled service."[29]

Gulf Power affirmed the conclusion that the Commission itself reached in its *1998 Implementation Order* on this score.[30] In that order, the Commission concluded that Section 224(b)(1) authorized it to apply any just and reasonable rate the Commission chose to attachments by cable operators used to provide cable television service and high speed Internet access.[31] Specifically, the Commission concluded that "[t]he definition of 'pole attachment' does not turn on what type of service the attachment is used to provide."[32] Accordingly, under Gulf Power and the underlying *1998 Implementation Order*, the COMMISSION has the authority to set a "just and reasonable" rate (or rate formula) of its own choosing for all pole

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[28] *Gulf Power*, 534 U.S. at 335-36 (citations omitted).

[29] *Id.* at 339 (citation omitted).

[30] *1998 Implementation Order* ¶¶ 26-35.

[31] *Id.* ¶¶ 33-34.

[32] *Id.* ¶ 30.

attachments by covered entities (*i.e.*, providers of telecommunications service and cable television systems) used to provide broadband.

Section 224's legislative history further supports the conclusion that Section 224(b)(1) grants the Commission authority to regulate broadband attachments by providers of telecommunications services and cable television systems. For example, a Conference Report accompanying the 1996 amendments to Section 224 confirms that Congress amended Section 224 by expanding "the definition of 'pole attachment' to include attachments by *all* providers of telecommunications service."[33] A House Committee Report also uses the "*all* providers of telecommunications" language.[34] The Conference Report also explained that the broader definition was added to "remedy the inequit[ies] of charges for pole attachments *among providers of telecommunications services.*"[35]

Section 706 also supports the adoption of a single rate formula for attachments by all providers of broadband services. As the Commission's prior decisions indicate, the pursuit of a consistent regulatory framework across platforms is a necessary component of furthering Section 706's policy of "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[36] As the Commission has already tentatively

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[33] S. REP. NO. 104-230, at 206 (1996) (Conf. Rep.) (emphasis added).

[34] H.R. REP. NO. 104-204(I), at 92 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 58 ("Section 105 is intended to remedy the inequity for pole attachments among providers of telecommunications and remedy the inequity for pole attachments among providers of telecommunications services . . . [it] expands the definition of 'pole attachment' to include attachments by *all* providers of telecommunications service." (emphasis added)).

[35] *Id.* (emphasis added).

[36] 47 U.S.C. § 157 (Incorporating Section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat 56 (1996)). *See also*, Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd 5901, ¶ 2 (2007) ("establish[ing] a consistent regulatory framework across broadband platforms by regulating like services in similar manner"); Memorandum Opinion and Order, *United Power*

concluded, the "critical need to create even-handed treatment and incentives for broadband deployment would warrant the adoption of a uniform rate for all pole attachments used for broadband Internet access."[37] Indeed, as the Commission has previously explained, the disparate regulatory treatment of like providers of similar broadband services, which is present in the current regulatory regime governing pole attachment rates, can distort investment decisions and tilt the competitive playing field, thereby failing to "'promot[e] competition in every section of the communications industry' as Congress intended in the 1996 Act."[38]

Therefore, as the statute's history, its express terms, Section 706, and the relevant Supreme Court and COMMISSION precedent all make clear, the Commission unquestionably has authority to adopt a common rate formula for use when providers offer broadband service in combination with either cable television service or telecommunications service, or offer a combination of all three. The Commission should exercise that authority now and promptly adopt a common rate formula for any entity that provides broadband services in combination

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Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband Over Power Line Internet Access Service as an Information Service, 21 FCC Rcd 13281, ¶ 2 (2006) ("This Order also furthers the Commission's goal of developing a consistent regulatory framework across broadband platforms by regulating like services in a similar manner."); Report and Order and Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 20 FCC Rcd 14853, ¶ 1 (2005) ("[T]he framework we adopt in this Order furthers the goal of developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner."); Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, ¶ 6 (2002) ("[W]e seek to create a rational framework for the regulation of competing services that are provided via different technologies and network architectures . . . . [and w]e strive to develop an analytical approach that is, to the extent possible, consistent across multiple platforms.") (subsequent history omitted).

[37] *NPRM* ¶ 36.

[38] *1998 Implementation Order* ¶ 31 (quoting Preamble to the 1996 Act and citing 142 Cong. Rec. S687-01, S687 (daily ed. Feb 1, 1996) (Statement of Sen. Hollings)).

with other services in order to rationalize the various disparate rates for pole attachments and put all broadband providers on equal footing with respect to the costs of pole attachments.

B. The Commission Should Also Clarify That ILECs Can Use the Existing Complaint Processes and Procedures to Challenge Unreasonable Pole Attachment Rates, Terms, and Conditions.

The Commission's rules are ambiguous concerning whether ILECs can use the Commission's existing complaint process for pole attachments to challenge unreasonable pole attachment rates, terms, and conditions. Section 224(b)(1) gives the Commission the authority to hear and resolve complaints concerning the rates, terms, and conditions for *any* pole attachment by providers of telecommunications service, which as explained above, includes all attachments by ILECs. Yet, Rule 1.1401 suggests that the Commission's complaint and enforcement procedures apply to cable television systems and telecommunications carriers, but does not expressly mention ILECs.[39] Some pole owners have interpreted this ambiguity as precluding ILECs from filing complaints at the Commission to obtain relief from unreasonable pole attachment rates, terms, and conditions.

As a result of this ambiguity, the complaint process does not serve as an effective deterrent against the imposition of unreasonable pole attachment rates, terms, and conditions on ILECs by utilities that own more poles than ILECs. As the Commission previously observed, investor-owned electric utilities solely own "the majority of poles nationwide" that are used to deliver broadband, cable, and telecommunications services.[40] Indeed, in general, investor-owned

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[39] 47 C.F.R. § 1.1401 expressly states "The rules and regulations . . .provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way on rates, terms and conditions that are just and reasonable."

[40] *See* Consolidated Partial Order on Reconsideration, *Amendment of Commission's Rules and Policies Governing Pole Attachments,* 16 FCC Rcd 12103, ¶ 23 (2001) ("The majority of poles nationwide are owned or controlled by electric utilities, with the remaining poles owned or controlled by telephone companies.")

electric utilities solely own *three times* as many poles as ILECs.[41] However, in some states, investor-owned electric utilities solely own as much as *twenty times* as many poles as ILECs. As a result of their majority ownership status, investor-owned electric utilities have considerable leverage in their negotiations with ILECs over attachment rates, terms, and conditions.

Many utilities with an extensive pole ownership advantage over ILECs in their service areas frequently exploit their leverage by imposing unreasonable pole attachment rates, terms, and conditions on ILECs. Those utilities substantially benefit from charging ILECs unreasonable rates, terms, and conditions (including, but not limited to, collecting sizeable pole rent revenues from ILECs) and therefore have little incentive to adopt more reasonable rates, terms, and conditions.

As the Commission previously explained, these types of unreasonable rates, terms, and conditions serve as obstacles to the expansion of advanced telecommunications services.[42] Clarifying that ILECs can use the existing complaint processes and procedures to challenge unreasonable pole attachment rates, terms, and conditions would significantly reduce these obstacles by providing a stronger deterrent against the exploitation of ILECs on pole attachment rates, terms, and conditions.

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[41] *See, e.g., Comments of the Public Utility Commission of Oregon*, WC Docket No. 07-245 at 2 (filed March 4, 2008) (stating "About 75 percent of the utility poles in Oregon that support both high voltage electric and communications networks are owned by electric utilities. ILECs own the rest. Oregon's electric utilities' share of these joint use poles has increased over time.")

[42] *See* Order, *Implementation of Section 703 of the Telecommunications Act of 1996; Amendments and Additions to the Commission's Rules Governing Pole Attachments,* 11 FCC Rcd 9541, ¶ 3 (1996).

C. The Commission Should Not Adopt Fibertech's Proposed Rules Concerning the Terms and Conditions of Pole and Conduit Access.

The Commission should reject Fibertech's proposed rules concerning the terms and conditions of pole and conduit access.[43] The existing Commission guidelines already ensure that pole and conduit owners provide timely, non-discriminatory access to poles and conduit.[44] Therefore, additional regulation concerning the terms and conditions of pole and conduit access is unnecessary. Moreover, in adopting the existing guidelines concerning the terms and conditions of pole and conduit access, the Commission expressly concluded that more specific rules were not appropriate because "there are simply too many variables to permit any other approach with respect to access to the millions of utility poles and untold miles of conduit in the nation."[45] Specifically, numerous agencies and entities already outline safety guidelines and impose specific requirements for pole and conduit attachments, including the Federal Energy Regulatory Commission, the Occupational Safety Health Administration, states and municipalities, pole owners, and widely-accepted industry codes concerning poles and conduits (*e.g.*, the National Electric Safety Code). For new attachments placed on poles or in conduit, pole and conduit owners consider factors specific to each pole and conduit site, as well as the applicable safety regulations and industry guidelines.[46] Recognizing the importance of these individualized factors, the Commission has declined to adopt specific rules governing the terms

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[43] *See* Petition for Rulemaking of Fibertech Networks, Docket No. RM-11303 (filed Dec. 7, 2005) ("Fibertech Petition").

[44] *Local Competition Order* ¶ 1124.

[45] *Id.* ¶ 1143.

[46] *See* Declaration of Gloria Harrington, ¶¶ 9, 21, 32, attached to Verizon's Opposition to Fibertech's Petition for Rulemaking, Docket No. RM-11303 (filed Jan. 30, 2006) ("Harrington Decl.").

and conditions of pole and conduit access. Nothing has changed that would warrant taking a different approach.

In proposing additional regulation of the terms and conditions of pole and conduit access, Fibertech ignores the fact that pole and conduit owners must consider many individualized factors, safety regulations, and the applicable industry codes before placing a new attachment or deciding to permit certain types of attachment methods. For example, Fibertech asks the Commission to *require* pole owners to permit "boxing" and the use of extension arms if "the pole owner has previously allowed use of the technique."[47] This proposed requirement overlooks the fact that the safety and feasibility of using boxing and extension arms must be evaluated on a case-by-case basis, taking into account numerous factors, such as the location of the pole and the placement of prior attachments.[48] Moreover, Fibertech ignores the fact that boxing and extension arms are not widely used as general construction techniques because they can complicate pole replacements, removals, and the cable transfers required when performing pole replacements.[49] The interest in increasing pole capacity does not justify limiting the ability of pole and conduit owners to consider well-established safety and engineering standards and factors specific to each pole location.

For similar reasons, the Commission should reject Fibertech's proposed rules prohibiting pole owners from requiring attachers to obtain a license or submit an application before installing drop lines, banning inspection of attachers' work, and requiring ILECs with facilities in building-

[47] Fibertech Petition at 5, 13, 16.

[48] *See, e.g.*, Harrington Decl. ¶¶ 9-16.

[49] Harrington Decl. ¶¶ 9, 13-14.

entry conduit to permit other carriers to install additional facilities in that conduit.[50] Like the proposed rule requiring pole owners to permit boxing and extension arms, these proposed rules also ignore general safety and engineering principles. These rules would also interfere with the fair and efficient administration of pole and conduit access.

Additionally, the Commission should reject Fibertech's proposed rules concerning the timing of surveys and make-ready work. Specifically, Fibertech proposes shortening the existing time frames for surveys and responding to licensing applications from 45 to 30 days; implementing new time frames for the performance of make-ready work and *requiring* pole and conduit owners to permit contractors hired by others to perform make-ready work on the owner's behalf.[51] But Section 1.1403(b) of the Commission's rules already requires pole owners to respond to surveys and applications within a 45-day time frame, which balances attachers' needs for timely access to pole and conduit against pole and conduit owners' need to ensure that proposed attachments are installed safely.[52] Additionally, the Commission's guidelines already require pole owners to provide timely, non-discriminatory access to poles, thereby giving attachers the right to challenge unreasonable delays in placing pole attachments. Because the existing guidelines adequately speak to these timing issues, additional regulation is unnecessary.

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[50] *See* Fibertech Petition at 31 (proposing that the Commission adopt a rule prohibiting conduit owners from requiring that their employees supervise work in manholes); *id.* at 21 (proposing that the Commission adopt a rule prohibiting conduit owners from using licensing requirements for drop lines); *id.* at 36 (proposing that the Commission adopt a rule requiring ILECs with facilities in building-entry conduit to permit other carriers to install additional facilities in the conduit, even when there is no innerduct to separate the facilities or when all innerduct is occupied.)

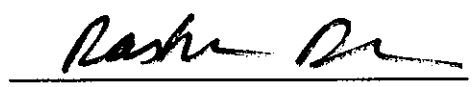
[51] Fibertech Petition at 16-21.

[52] *See* 47 C.F.R. § 1.1403(b).

III. CONCLUSION

For the foregoing reasons, the Commission should adopt a uniform rate formula for all providers of broadband services as well as all ILEC attachments. That rate formula should be based on factors that produce the lowest rate possible and establish competitive parity and compensate pole owners for their costs of providing space for pole attachments. Additionally, the Commission should clarify its existing rules to make clear that ILECs can file complaints at the Commission to seek relief from reasonableness of pole attachment rates, terms, and conditions. Lastly, the Commission should reject Fibertech's proposed rules concerning the terms and conditions of pole and conduit access.

Respectfully submitted,



Karen Zacharia
Rashann R. Duvall
VERIZON
1515 North Courthouse Road, Suite 500
Arlington, VA 22201-2909
(703) 351-3179

Helgi C. Walker
Brendan T. Carr
WILEY REIN LLP
1776 K Street, NW
Washington, D.C. 20006
(202) 719-7000

Attorneys for Verizon

Michael E. Glover
Of Counsel

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